Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Bell Atlantic NYNEX Mobile, Inc. ("BANM"), by its attorneys, hereby opposes two petitions for reconsideration of the Commission's *Report and Order* (*Order*) in this proceeding.[1] Specifically, BANM opposes the Petition for Reconsideration filed by Omnipoint Corporation, which urges the Commission to reverse its detailed findings in the *Order* and to reinstate the cellular/PCS cross-ownership rule. BANM also opposes the Petition for Partial Reconsideration filed by Radiofone, Inc., to the extent it asks the Commission to impose a stricter spectrum cap on Block B cellular licensees than on Block A licensees. Neither petition presents a credible basis for modifying the *Order*, and both should be denied.

---

[1] *Report and Order*, FCC 96-278 (released June 24, 1996). Public notice of the petitions occurred August 13, 1996. 61 Fed. Reg. 42021. This opposition is therefore timely under Section 1.429 of the Commission's Rules.

I. Omnipoint Fails To Offer Any New Arguments For Reinstating the Cross-Ownership Rule.

In light of the Sixth Circuit's remand in *Cincinnati Bell Telephone Co. v. FCC,* 69 F.3d 752 (6th Cir. 1995) ("*Cincinnati Bell*"), the Commission reexamined Section 24.204 of its Rules, which prohibited cellular/PCS cross-ownership where there was "significant overlap" of the cellular and PCS service territories.[2] As part of this extensive reexamination of the cellular/PCS cross-ownership restriction, the Commission solicited and received comments from more than 60 interested parties.[3] After review of the entire record in this proceeding, including this latest round of comments, the Commission decided to rescind its limitation on cellular/PCS cross-ownership in favor of the general 45 MHz CMRS spectrum cap set forth in Section 20.6 of its Rules.[4]

Omnipoint now asks the Commission to reverse this decision. While an interested party is entitled to petition the Commission to reconsider any final agency action, the petition may not simply rehash arguments already considered

---

[2] In *Cincinnati Bell,* the Sixth Circuit found that the Commission's cellular/PCS cross-ownership restriction was arbitrary and capricious, concluding that "the FCC provided little or no factual support" for its concern that cellular licensees would engage in anticompetitive behavior or exert undue market power. 69 F.3d at 762-63. The Sixth Circuit remanded the case to the Commission for further consideration and instructed the Commission to consider all relevant facts in the record and to articulate a "rational connection between the facts found and the choice made." 69 F.3d at 758.

[3] *See Notice of Proposed Rule Making,* WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-119 (Mar. 20, 1996), *summarized,* 1 Fed. Reg. 13133 (1996).

[4] *Report and Order* ¶¶ 86-107.

and rejected by the Commission in previous stages of the rulemaking proceeding.[5] That is, however, exactly what Omnipoint has done here. It does not attempt to argue that the Commission has exceeded its statutory authority, nor could it.[6] Instead, it contests the wisdom of the *Order* on policy grounds, but fails to offer any new arguments or facts. Omnipoint merely offers the same arguments as those advanced by itself and other parties in prior comments.[7] The Commission should summarily dismiss Omnipoint's petition as repetitious.

II. The Commission Properly Decided to Eliminate the Cross-Ownership Rule.

Congress enacted the Telecommunications Act of 1996 to remove unnecessary government regulation in the telecommunications industry and to

---

[5] "Petitions for reconsideration are not granted for the purpose of debating matters which have already been fully considered and subsequently settled. . . . In essence, the petition for reconsideration simply restates the objections to the DBS rulemaking that have been stated previously by petitioner and others. . . . That petitioner disagrees with one of [the Commission's] policy choices . . . is quite clear. However, bare disagreement, absent new facts and argument properly placed before the Commission, is insufficient grounds for reconsideration." Direct Broadcast Satellite Service, 53 RR2d 1637, 1641-42 (1983).

[6] As Omnipoint acknowledges, the Court in *Cincinnati Bell* "found that the Commission has full authority to impose a variety of rational spectrum cap limits as between competing mobile providers." (Petition at 3.) The Court held that the Commission is neither required to nor prohibited from permitting cellular/PCS cross-ownership so long as the Commission articulates a "reasoned basis" explaining its chosen rule. 69 F.3d at 763.

[7] Omnipoint's principal claims are that the cellular/PCS rule is needed to promote competition and that PCS licensees relied on that rule in bidding for earlier PCS spectrum. Both of these arguments were raised in response to the *Notice of Proposed Rulemaking* in this proceeding. As the Commission correctly notes, however, most comments favored repealing the rule. *Order* at ¶¶ 87-91.

promote and encourage free and unfettered competition in the marketplace.[8] Consistent with Congress' mandate, the *Order* properly concluded that the cellular/PCS cross-ownership rule broadly restrained an entire class of potential licensees -- *i.e.,* existing cellular spectrum holders -- without substantial economic justification that the rule was required to promote a competitive environment.

The Commission initially promulgated the cross-ownership rule out of concern that existing cellular licensees would aggregate sufficient PCS spectrum to deter competitive entry into the emerging PCS marketplace. However, it subsequently promulgated the CMRS spectrum cap rule, Section 20.6, which imposes a 45 MHz limit on the total overlapping spectrum which can be held by a single entity. That rule, coupled with the size and number of the PCS spectrum blocks, makes it impossible for cellular carriers to acquire sufficient spectrum to block entry of new competitors.

Under the broadband PCS spectrum block allocation plan, the Commission already has held auctions for three 30 MHz blocks (A, B, and C), accounting for 75% of broadband PCS spectrum. Cellular providers were not eligible to bid on any of these licenses where the PCS and cellular service territories would substantially overlap. Moreover, of the remaining three 10 MHz blocks (D, E, and F), one block is reserved for entrepreneurs and small businesses. Many cellular carriers are ineligible for holding these licenses as well. Even if they are eligible,

---

[8] *See* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (1996 Act establishes "a procompetitive, deregulatory national policy framework" intended to "promote competition and reduce regulation.").

the 45 MHz spectrum cap prevents them from acquiring all three 10 MHz blocks. Each geographic market will thus have at least three and up to six new non-cellular competitors holding almost all of the PCS spectrum. The Commission correctly found that given a cellular carrier's ability to acquire at most only up to 20 MHz out of the 120 MHz of total PCS spectrum, cellular carriers cannot capture enough market share to have any plausible anti-competitive effect. In any event, all PCS licensees have the same opportunity to acquire any of these spectrum blocks as do cellular carriers.

In addition, the Commission cannot adopt rules which penalize cellular providers for their existing spectrum holdings based solely on mere speculation of future anti-competitive conduct. The Sixth Circuit in *Cincinnati Bell* clearly held that any rule adopted by the Commission must have support in the factual record.[9] After an extensive review of this record, the Commission properly concluded that no evidence exists to support the claim that cellular licensees could acquire sufficient PCS spectrum to have an anti-competitive impact. The Commission's decision to eliminate the cellular/PCS cross-ownership rule was consistent with the record evidence and fully complied with the Sixth Circuit's mandate.[10]

---

[9] *Cincinnati Bell*, 69 F.3d at 763.

[10] It is noteworthy that, of the more than 60 parties who participated in this proceeding, Omnipoint is the only one to seek reconsideration of the Commission's repeal of the cellular/PCS cross-ownership rule.

Omnipoint suggests that the Commission's HHI analysis is flawed and does not provide sufficient economic support for the Commission's decision to eliminate the cellular/PCS cross-ownership rule. Omnipoint argues that the Commission should have measured the competitive strength of the market participants in terms of actual sales rather than based on capacity measured by available PCS spectrum. Omnipoint's proposed analysis is flawed because it looks backward. The Commission properly employed a forward-looking approach, which recognizes that PCS carriers are only now coming on line. As the new PCS license holders build out their systems within the next couple years, there will be an influx of new competitors and a rapid expansion of PCS services.[11] In this fast-developing marketplace, the Commission's use of spectrum to evaluate competitive conditions meets the requirement that the Commission "supply a reasoned basis" for its action.[12]

Omnipoint offers a litany of disadvantages that it believes PCS licensees face, including "microwave incumbent interference" and "1.9 GHz propagation characteristics." (Petition at 11-13.) But these problems are hardly new, and Omnipoint was well aware of them in bidding for PCS licenses. Moreover, they

---

[11] Citing the rapid evolution of wireless services, Radiofone, Inc., in its Petition for Partial Reconsideration, takes precisely the opposite position from Omnipoint, and argues that the Commission's HHI analysis was too *conservative*. Radiofone asserts that a proper HHI analysis supports repealing not only the cellular/PCS rule but also the 45 MHz spectrum cap.

[12] *Cincinnati Bell*, 69 F.3d at 763, *quoting Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992).

are irrelevant. They in no way undermine the Commission's determination, based on the record, that a 45 MHz cap was sufficient.

While Omnipoint claims that the 35 MHz cellular/PCS cross-ownership rule would promote competition, that is not the issue. Rather, the issue is whether the Commission has provided a rational basis for relying on the 45 MHz overall spectrum cap. Omnipoint fails to demonstrate that the 45 MHz cap would not achieve the Commission's objectives. The plain fact is that this cap ensures the presence of multiple CMRS providers in every market, and it precludes any cellular carrier from acquiring more than a total of 45 MHz out of the 170 MHz allocated to cellular and broadband PCS.[13] Omnipoint, or any other CMRS provider, can obtain exactly the same amount of spectrum. The spectrum cap rule is therefore competitively neutral. Omnipoint's assertions that it will allow cellular carriers to act anti-competitively are unsupported speculation.

[13]In fact there is additional CMRS spectrum available for SMR and other PCS services, which would make a cellular carrier's share of total CMRS spectrum even smaller. And, even were a cellular carrier to acquire the maximum 45 MHz, it would face disadvantages vis-a-vis the PCS licensee holding that same amount of spectrum, because the cellular carrier would be forced to incur substantial costs in system and subscriber equipment in order to integrate the different frequency bands used for cellular and PCS.

III. Radiofone's Request for Different Spectrum Caps for A-Block and B-Block Cellular Carriers Must Be Rejected.

In a separate Petition for Partial Reconsideration, Radiofone, Inc. argues that the Commission did not go far enough in changing the CMRS cross-ownership rules and that it should have eliminated the 45 MHz spectrum cap as well as the 35 MHz cellular/PCS rule. If, however, the Commission retains the spectrum cap, Radiofone requests that be applied only to Block B cellular carriers who are affiliated with wireline telephone companies in the same market, but not to the competing Block A cellular carriers. Block A carriers would be able to acquire more, up to *55 MHz* of spectrum (e.g., one of the 30 MHz PCS spectrum blocks). Petition at 18-22.

Radiofone's proposal must be quickly rejected. First, it is procedurally defective. The *Notice of Proposed Rulemaking* focused on whether to retain the cellular/PCS ownership rule, not on changes to the separate spectrum cap rule. Such changes are beyond the scope of this proceeding, and are inappropriate in a petition for reconsideration of the *Order*. Radiofone itself labels its request as an "alternative proposal." It may advance such a proposal in a petition for rulemaking, but not here.

Second, Radiofone's proposal would discriminate against B-block cellular carriers in favor of their A-block competitors. It would contradict years of Commission policy which has steadfastly avoided disparate treatment of the wireline and nonwireline cellular carriers. Radiofone trots out the same claims of

"wireline headstart" which were repeatedly and unsuccessfully advanced by nonwireline cellular carriers in search of preferential rules. The Commission has refused to adopt special preferences for A-block licensees, noting that the wireline/nonwireline distinction was only an initial licensing distinction and would not carry through once systems were licensed.[14]

Third, Radiofone's proposed change in the spectrum cap would violate Congressional and Commission policies of regulatory parity among similarly situated CMRS providers. In the 1993 amendments to the Communications Act, Congress directed the Commission to ensure consistent regulatory treatment of CMRS providers offering competitive services, and the Commission has implemented Congressional policy by modifying its rules to make them symmetrical among competing services.[15] Given that the Commission has held that rules should be consistent among *different* types of mobile services (cellular, PCS and certain SMR), it could hardly adopt a rule that discriminates among two

---

[14]*E.g., James F. Rill*, 60 RR2d 583, 593-94 (1986) (wireline/nonwireline distinction was only "an application processing tool" for the issuance of construction permits and was not intended "to regulate the subsequent ownership structure of the industry"); *Metromedia Co.*, 61 RR2d 1165, 1168 (1986) (rejecting claim that B-block carriers had unfair advantages warranting stricter ownership limits).

[15]*E.g., H. Conf. Rep. 103-213*, 103d Cong., 1st Sess. 494 (1993) (intent of Congress in amending Section 332 is that "consistent with the public interest, similar services are accorded similar regulatory treatment."); *CMRS Second Report and Order*, 9 FCC Rcd 1411, 1418 (1994) (Section 332(c) intended "to ensure that similar services would be subject to consistent regulatory classification."); *CMRS Third Report and Order*, 9 FCC Rcd 7988, 8003 (1994) (adopting uniform rules "will minimize the potentially distorting effects on the market of asymmetrical regulation.").

competing cellular providers offering the *same* type of mobile service.

Radiofone's proposal is both procedurally defective and substantively meritless. It should be rejected.

CONCLUSION

For the foregoing reasons, BANM urges the Commission to deny Omnipoint's petition to reinstate the cellular-PCS cross-ownership rule, and also to deny Radiofone's petition to the extent it calls for a modified spectrum cap which discriminates between A and B block cellular carriers.

Respectfully submitted,

BELL ATLANTIC NYNEX MOBILE INC.

By: John T. Scott, III

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Its Attorneys

Dated: August 28, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of August, 1996, had copies of the foregoing "Opposition to Petitions for Reconsideration" sent by first-class mail, postage prepaid, to the following:

Mark J. Tauber, Esq.
Piper & Marbury L.L.P.
1200 19th Street, N.W., 7th Floor
Washington, D.C. 20036
Counsel to Omnipoint Corporation

Ashton R. Hardy, Esq.
Hardy & Carey, L.L.P.
111 Veterans Boulevard - Suite 255
Metairie, LA 70005
Counsel to Radiofone, Inc.

John T. Scott, III